United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be argued by
STANLEY SCHAIR

75-4116

United States Court of Appeals

FOR THE SECOND CIRCUIT

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and W. J. USERY, JR., Secretary of Labor,

Respondents,

—and—

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC and its LOCAL No. 301,

Intervenors.

PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

B
P/s

PETITIONER'S REPLY BRIEF

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Prefatory Statement

The main brief of General Electric Company, petitioner herein, has for the most part anticipated and answered the arguments presented in the briefs of respondent-Secretary of Labor and of the intervening Union.[1] We shall limit our arguments herein accordingly.

[1] Hereinafter GE's main brief shall be referred to as "Co. Br." and the brief of the Secretary as "R. Br." Unless otherwise indicated numbers in parentheses followed by an "a" refer to pages of the Joint Appendix.

The Secretary's brief explicitly espouses the unprecedented and far-reaching holding of the divided Commission that an employer is the insurer and guarantor of its employees' *use* of eye protection equipment even though (a) it has furnished the equipment and (b) has inaugurated and policed a safety enforcement program under which it has successfully reduced cases of non-use to a rarity (Co. Br. 11-13; 367a, 407a). Thus the Secretary asserts at page 20 of his brief that the eye protection standard here applied must be read to "make employers responsible for *assuring use* of the eye protective equipment required to be provided."[2] The Secretary, however, notably offers no direct support for this interpretation of the law and, indeed, ignores the pervasive and growing body of controlling court precedents, in this circuit[3] and elsewhere,[4] to the contrary.

As for the alleged power platform violation, the Secretary concedes in his brief that there is no "direct" evidence of a violation occurring within the six-month limitations period (R. Br. 35, 36). He nevertheless rests his case on a claimed inference to be drawn from circumstantial evidence which is at best ambiguous and highly suspect. No such inference can in fact be supported on the record evidence in this case (Co. Br. 13-15, 37-39).

The Secretary also seeks to defend the Commission's obvious error in applying the §1910.23(c)(1) standard on platform guarding to the K-11 power platform here involved (instead of §1910.28(a)(3) governing scaffolds and temporary platforms). He advances the novel and entirely

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[2] Emphasis added.

[3] *E.g., REA Express, Inc.* v. *Brennan,* 495 F.2d 822 (2d Cir. 1974).

[4] See, *e.g.,* cases cited at n. 14 *infra.*

fallacious argument that "platform" as used in .23(c)(1) was intended to include *all* types of platforms (temporary, fixed, mobile or otherwise), notwithstanding the fact that the regulations establish markedly different standards depending on whether the platform in question is fixed or permanent (not the case here) or temporary and/or mobile (precisely the case here).[5] Again, the Secretary ignores an entire body of decisional authority,[6] this time the long line of cases recognizing differences among the various types of platforms and limiting the reach of .23(c)(1) to fixed or permanent platforms.[7]

The Union's brief reads as if there were no case law *at all* under the Occupational Safety and Health Act of 1970. In a brief covering 55 pages, the Union does not cite to a single decision of the Commission, or of any court, either in support of its own arguments or in response to the arguments presented in GE's main brief and the more than 50 decisions under the Act cited by the Company in support thereof. The Union's brief is so preoccupied with extolling its own virtues as a safety monitor and with wordy but legally unsupported attempts to absolve employees from their own misconduct and, indeed, from any responsibility for safety under the law, that it calls for no further comment or reply. Accordingly, in this reply we shall focus our comments solely on the arguments presented in the Secretary's brief.

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[5] See Co. Br. 40-42. Scaffolds are defined in the OSHA standards as a form of temporary platform (Co. Br. 42).

[6] Co. Br. 41-42.

[7] Even under the Secretary's view of the evidence, there would not be a violation here if the guarding standard contained in .28(a)(3) was applied since that standard does not require guarding unless the platform is used above 10 feet.

I.

The Alleged Eye Protection Violation

1. The Secretary recognizes that the Commission's imposition on the employer of the role of guarantor of its employees' actual use of eye protective equipment is a radical departure from past precedent and the creation of a wholly new standard of compliance for employers under the Act (R. Br. 17-19), a standard which was not in being at the time of GE's alleged violation herein.

The sole reason offered by the Commission majority for this departure is that its new approach is "intrinsically sounder and verified by experience" (367a). But, as fully discussed in the Company's main brief (Co. Br. 20-23), the Commission did not articulate its rationale or cite to any supporting data or experiences for this dramatic and unexpected reversal in its construction of Section 1910.133(a)(1), the standard governing eye protection. Under these circumstances, the cases cited in footnote 25 (at p. 21) of GE's main brief require dismissal of the citation.[8]

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[8] Possibly recognizing the Commission's error in this regard, the Secretary argues (R. Br. 17), that GE might have been found in violation of .133(a)(1) even under the Commission's previous interpretation, as represented by *Cam Industries*, the case overruled herein. The Secretary bases his speculation on the erroneous belief that GE failed to furnish the employees involved in this case with adequate eye protection because the protective glasses supplied did not have side shields (R. Br. 6, 17, 22). However, neither the Commission nor its Administrative Law Judge found that the protective equipment supplied by GE was either inadequate or not suitable under the cited standard. The sole issue decided in this case involved GE's responsibility for the employees' failure to *use* the equipment supplied them. And this was clearly recognized by the ALJ who rebuffed all attempts by the Secretary at the hearing to expand the issues to include the question of the

The Secretary attempts to avoid such a result by offering *post hoc* rationalizations for the Commission's decision. But the United States Supreme Court has ruled that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." *NLRB* v. *Metropolitan Ins. Co.*, 380 U.S. 438, 444 (1965). Mr. Chief Justice Burger, dissenting in *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 269 (1975), reiterated in the following language the long-standing principle that government agencies are required to explain their adoption of new approaches and standards:

> "The integrity of the administrative process requires that '[w]hen the Board so exercises the discretion given to it by Congress, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 197.' *NLRB* v *Metropolitan Ins. Co.*, 380 U.S. 438, 443 (1965)."

The Commission fails to offer either here, or in any other case cited by it, any reason whatsoever for its overruling of *Cam Industries* and its adoption of a new rule.

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adequacy of the equipment supplied. Thus the following colloquy is reported at Tr. 170a-171a):

> "Q. Would normal safety glasses be appropriate for jack hammer operations?
>
> "Mr. Cummings [attorney for GE]: Objection, your Honor.
>
> "The Court: We have testimony that they weren't using anything. The only question before me is whether using nothing is any kind of protection."

The ALJ again foreclosed the Secretary from going beyond the issues in the case by seeking to elicit testimony on the adequacy of the equipment supplied at Tr. 166a-167a.

The Secretary's reliance on the *Weingarten* opinion, quoted at length in its brief (R. Br. 18), is clearly misplaced. There the new rule adopted by the NLRB had "evolved" in numerous cases over a period of more than 30 years. And the Court majority concluded that the NLRB's "newly arrived at construction of §7 does not exceed the reach of that section, and the Board has *adequately explicated the bases of its interpretation*" (420 U.S. at 267; italics ours). Unlike the Board's decision in *Weingarten*, the Commission's decision here was neither "adequately explicated" nor evolutionary.[9]

The Commission's unexplained and bare assertion that its change of policy was "verified by experience" cannot substitute for a well-reasoned and fully explicated opinion.

Moreover, a study of the Commerce Clearing House Reports on OSHA cases tellingly reveals that in the 13 months between the Commission's decisions in *Cam Industries* and *GE*, the Commission and its Administrative Law Judges dealt with the question of the employer's obligation to require the use of eye protection under .133(a)(1) in only *three* cases. Of these, only *Nibco of Colorado Div., Nibco, Inc.*, OSHRC No. 302, 9 OSAHRC 325, CCH O.S.H.D. ¶18037 (1974), was a Commission decision, and it *reaffirmed Cam Industries*. In the only two

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[9] The Secretary also cites *NLRB* v. *APW Products Co.*, 316 F.2d 899 (2d Cir 1963) and *Fraenkel* v. *U. S.*, 320 F. Supp. 605 (S.D. N.Y. 1970) in support of its defense of the Commission's abrupt reversal in its interpretation of the eye protection standard. Both these decisions are inapposite. *APW* dealt solely with a change in the NLRB's policy on *remedies* and was clearly distinguished by this Court in *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966), from a case involving substantive change as, for example, where once lawful conduct is declared unlawful. In *Fraenkel*, there was no assertion, as there is here, that the agency's action departed from the standards applied in other cases.

ALJ decisions,[10] violations were found where the employer had promulgated *no requirement whatsoever* that eye protection be used. These decisions, too, were consistent with *Cam Industries* wherein the employer was adjudged in compliance with the requirements of .133(a)(1) since he had provided suitable eye protectors and instructed his employees to use them.

Thus it readily can be seen that the Commission, in fact, had no real experience to verify or support its reversal of *Cam Industries*. And even the most elementary concept of fairness requires that an employer not be subject to condemnation and penalties under the law on the basis of such an abrupt, unexplained and unsupported reversal of existing guidelines as occurred in this case.[11]

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[10] *Edfran, Inc.*, OSHRC No. 6731, CCH O.S.H.D. ¶18784 (1974); *Durant Foundry & Machine Co.*, OSHRC No. 3601, CCH O.S.H.D. ¶18361 (1974). In another case which dealt with the issue of whether the employer had *provided* the protective equipment, in contrast with the question of *use*, no violation was found where the evidence established that the equipment was supplied and made available, although it could not be found at the time of the OSHA inspection. *WKRG-TV*, OSHRC No. 5857, CCH O.S.H.D. ¶17848 (1974).

[11] The Commission majority, it should be noted, was also conspicuously silent concerning the Ninth Circuit's affirmance of its *Alsea* decision (discussed *in extenso* in Co. Br. 25-28) where, in a factual situation analogous to *GE*, the Commission had ruled that there was *no* violation of .133(a)(1). The dissenting member in *GE*, however, did not ovelook *Alsea* and, indeed, cited it in support of his refusal to find a violation by GE. The Secretary apparently is uncertain as to how he should treat *Alsea*. On page 22 of his brief he cites the Ninth Circuit's decision with approval and then, in note 18 on page 28 of his brief, desperately but unsuccessfully tries to escape both the Commission's and the court's holdings in *Alsea* by branding the Commission's decision as merely an "early" one (1973) and by contending that the Ninth Circuit "misinterpreted every case" it therein relied on. Far from discredited, the court's decision in *Alsea* has been cited with approval subsequent to the *GE* decision both by the Commission itself and by other appellate courts. *Engineers, Inc. of Vermont*, OSHRC No. 3551, CCH O.S.H.D. ¶20012 (1975); *Horne Plumbing & Heating Co.* v.

Nor was the Secretary able to formulate, much less support, a reasonable explanation for the Commission's new interpretation of .133(a). As previously noted, the Secretary argues that the cited standard must be interpreted to make an employer an *insurer* of his employees' use of eye protectors in order for it to be consistent with "its purpose and Congress' intent to place ultimate responsibility for compliance with such requirements on employers *alone*" (R. Br. 19-20; italics ours). According to the Secretary, .133(a)(1) "does not expressly place any obligations on employees . . . " (R. Br. 20).

Yet the standard's language itself requires that "employees shall use such protectors." And the subsequent clause which imposes on employers the obligation not to "knowingly" subject an employee to hazards does not make the employees' obligation to use the equipment provided any less.[12] It merely recognizes that once an employer be-

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OSHRC, —— F.2d ——, No. 74-3897, CCH O.S.H.D. ¶24504 (5th Cir. 1976). It is not surprising that the Secretary wishes to evade the full force of *Alsea* for that case requires that the citation issued here under .133(a)(1) be dismissed. Another attempt to escape the true purport of *Alsea* is found on page 25 of the Secretary's brief where he attempts without success to distinguish *Alsea* on the facts, claiming erroneously that, unlike GE, *Alsea* had well-enforced safety instructions. But the *Alsea* employer had no formal safety program while, as found by the ALJ in this case, "the COs [OSHA compliance officers] and the Union Safety Director considered Respondent's [GE's] protective glasses program to be a good one" (331a).

[12] Under the Secretary's interpretation the provision requiring the employees to use the protectors is somehow completely nullified by this subsequent clause. The duality of responsibility of employers and employees under the Act was recently recognized by the Fifth Circuit in *Horne Plumbing & Heating Co.* v. *OSHRC*, *supra*. See also Co. Br. 18-20. The fact that an employee may not be penalized under the Act for failure to perform his duty does not expand the employer's responsibility. Yet this is the essence of the Secretary's position in attempting to justify the action of the Commission in this case.

comes aware of the existence of a hazardous condition, he must provide the employees with proper protective eye equipment. And, as indicated in *Alsea,* the employer may not cause or knowingly acquiesce in his employees' non-use of the equipment supplied. But this obligation, fully discharged by GE in the case at bar, is a far cry from that of an insurer and the cited standard does not purport so to provide. If the Secretary intended otherwise, he should and could have specifically provided for such obligation.[13]

More importantly, the Act itself as well as the underlying congressional intent will not support the imposition of strict liability on employers. In a case decided as recently as February 26, 1976 by the Fifth Circuit, the court reviewed in great detail the status of the law on this subject, concluding that it would be inconsistent with congressional intent, the Act itself and the leading cases construing an employer's obligations thereunder, both under general duty and specific duty clauses, to impose strict liability on employers for the failure of their employees to follow safety instructions. *Horne Plumbing & Heating Co.* v. *OSHRC, supra.*[14]

The standard of absolute liability here urged by the Secretary was earlier rejected by this Circuit in *REA Express, Inc.* v. *Brennan,* 495 F.2d 822 (1974), where the Court stated:

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[13] The Secretary concedes that .133(a)(1) "does not *in haec verba* state that employers shall assure the use of equipment" (R. Br. 20).

[14] Citing *National Realty & Construction Co.* v. *OSHRC,* 489 F.2d 1257 (D.C. Cir. 1973); *Brennan* v. *OSHRC,* 501 F.2d 1196 (7th Cir. 1974); *Brennan* v. *Butler Lime & Cement Co.,* 520 F.2d 1011 (7th Cir. 1975); *Brennan* v. *OSHRC,* 502 F.2d 946 (3d Cir. 1974); *Alsea, supra* (9th Cir.).

> "At the same time, we do not consider that the Act imposes an absolute liability upon the employer. The congressional declaration of purpose and policy, 29 U.S.C. §651(b), states that the Act is designed 'to assure *so far as possible* every working man and woman in the Nation safe and healthful working conditions. . . .' (emphasis added). It may well be that some hazards are unpreventable, particularly if an employee's conduct is willfully reckless or so unusual that the employer could not reasonably prevent the existence of the hazard which his behavior creates."

Thus, the role of absolute guarantor or insurer which the Commission and Secretary have imposed on GE in this case has been rejected by at least six circuits.[15] And, as noted in *Horne,* the Commission itself (after *GE*) has adopted virtually the same position. *Engineers, Inc. of Vermont, supra.* As the Commission recently recognized in *Ocean Electric Corp.,* OSHRC No. 5811, CCH O.S.H.D. ¶20167 (1975):

> "to hold employers to absolute liability of guaranteeing compliance at all times . . . [would] not tend to promote the achievement of safer workplaces. If employers are told that they are liable for violations regardless of the degree of their efforts to comply, it can only tend to discourage such efforts. . . ."

In summary, if adopted, the Commission's new interpretation of .133(a)(1), imposing absolute liability on

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[15] At times in extremely tragic circumstances resulting in employee deaths, as in *National Realty* and *Horne,* the courts have refused to hold an employer responsible for accidents caused by the failure of its employees to obey safety instructions.

employers for employee non-use of eye protectors, would be inconsistent with the language of that standard, the congressional intent underlying the Act and the case law in this circuit and elsewhere.[16] It, moreover, would not tend to promote safer workplaces and, accordingly, should be rejected by this court.

2. No doubt recognizing his failure to sustain the burden of proving employer knowledge in this case, the Secretary at page 26 of his brief attempts to shift the burden to the employer and thereby create an unauthorized presumption of employer knowledge upon the mere establishment of a violation of the cited standard by an employee. This

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[16] In cases involving standards other than .133(a)(1) the Commission has applied a less stringent test of employer responsibility where there was employee noncompliance with work rules. See Co. Br. note 26; see also, *Texas Window Cleaning Co.*, OSHRC No. 11552 CCH O.S.H.D. ¶20150 (1976); *Mobil Oil Co.*, OSHRC No. 2128, CCH O.S.H.D. ¶20389 (1976); *Howard P. Foley Co.*, OSHRC No. 13244, CCH O.S.H.D. ¶20425 (1976). Even cases involving the application of §1910.132(a), relied on so heavily in the Secretary's brief (R. Br. 20-21), do not place absolute liability on employers for employee non-use of personal protective equipment. Thus, in *Budd Co.* v. *OSHRC*, 513 F.2d 201 (3d Cir. 1975), the court concluded that this standard mandates the employer to require the wearing of safety shoes; yet, at the same time, it recognized that "at least one of the items of conduct [required by the standard]—use—must be carried out by the employees." And in *Ryder Truck Lines, Inc.* v. *Brennan*, 497 F.2d 230 (5th Cir. 1974), the violation was, as in *Budd*, based on a failure to provide or require the wearing of safety shoes. In neither *Budd* nor *Ryder* did the courts reach the issue here involved, namely, whether an employer who has supplied protective equipment and instructed its employees to use the equipment, may be held as an absolute guarantor of the employees' actual use of the equipment at all times. *The issue apparently was reached, however, in at least one case which arose under both .133(a)(1) and .132(a), wherein the Judge dismissed the citation for failure to wear safety eye glasses on the ground that the employer provided all employees with safety glasses, required that they be worn at all times and disciplined employees who did not wear them. Sun Shipbuilding and Drydock Co.*, OSHRC No. 161, CCH O.S.H.D. ¶15196 (1972), *aff'd*, CCH O.S.H.D. ¶16725 (1973).

attempt to transform employer knowledge from an element of the violation to be proven by the Secretary to an "affirmative defense" provable by the employer is totally in contradiction of the Commission's own rules and the relevant decisions of both the Commission and the courts.

Commission Rule 73(a) places the burden of proof on all matters on the Secretary, except in a petition for modification of the abatement period. In *D. R. Johnson Lumber Co.*, OSHRC No. 3179, CCH O.S.H.D. ¶19695 (1975), the Commission (citing *Alsea*) interpreted the rule to apply to the very provision of Section 17(k) relied on by the Secretary here to support his argument of affirmative defense. Thus the Commission stated:

> "It is, therefore, his [the Secretary's] burden to show that either the respondent knew or could with the exercise of reasonable diligence have known [of the violation]. Absent such a showing, lack of employer knowledge must be presumed and no serious violation can therefore be found." [17]

Accord, cases cited Co. Br. 26-28; *Horne Plumbing & Heating Co.* v. *OSHRC, supra; Brennan* v. *OSHRC,* 494 F.2d 460 (8th Cir. 1974), *on remand sub nom Vy Lactos Labs.*, OSHRC No. 31, CCH O.S.H.D. ¶18039 (1974); *Bumble Bee Seafoods, Inc.*, OSHRC No. 10487, CCH O.S.H.D. ¶19908 (1975).[18]

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[17] The Commission further held that the Secretary would have to shoulder the same burden of proof to establish a non-serious violation.

[18] The cases cited by the Secretary (R. Br. 26) were not decided under the Act except for *Atlas Roofing*, which, we submit, does not stand for the proposition urged herein by the Secretary. *Atlas* does not hold that the employer has the burden of proof on the 17(k) proviso. It merely holds that lack of employer knowledge can defeat a citation.

3. The Secretary also attempts to relieve himself of the burden of proving that the alleged violation was foreseeable and preventable (R. Br. 23).[19] Yet neither he nor the Commission has cited a single step GE might have taken to prevent it or explained how GE could have foreseen that the two employees operating the jack hammer would not be wearing eye protectors supplied them. As fully discussed in our main brief (Co. Br. 23-26), the burden of establishing that the violation was foreseeable and preventable is on the Secretary and that burden was not carried by him in this case.[20]

The connecting thread running through the courts' decisions in this area is that since not all safety hazards and violations are preventable or, indeed, foreseeable, an employer only may be held responsible for violations which he either actually knew of or, with the exercise of reasonable diligence, might have foreseen and prevented. In deciding this issue, the courts invariably have focused on the safety program and instructions of the employer. See *e.g., Brennan* v. *Butler Lime & Cement Co.,* 520 F.2d 1011, 1018 (7th Cir. 1975), *on remand* OSHRC No. 855 CCH O.S.H.D. ¶20252 (1975); *Brennan* v. *OSHRC,* 501 F.2d 1196 (7th Cir. 1974); *Horne Plumbing & Heating Co.* v. *OSHRC, supra.* Thus in *Butler* the court concluded that the question of foreseeability "depends in great part on whether [the] employees . . . had received adequate safety instructions." And in *Horne,* the case turned on the adequacy of

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[19] That the employees here involved were working out in the open, albeit without direct supervision, does not as the Commission asserts go to preventability absent findings as to duration of the violation and/or employer acquiescence, neither of which are present here.

[20] As in the case of a general duty clause violation the need to prove feasibility is especially important in a case like this where the standard does not spell out what is required of the employer, if anything, in the area of employee use of eye protectors.

the instructions given employees in the employer's safety program.

But the employer need only do what is reasonable and feasible. Measures beyond this, which are either so untested or expensive as to be considered unreasonable or infeasible, are not required. See *Horne Plumbing & Heating Co.* v. *OSHRC, supra.* Thus, for example, constant supervision ordinarily need not be provided. *Id.; Texas Window Cleaning, supra; Brennan* v. *OSHRC,* 502 F.2d 946 (3d Cir. 1974). Nor must the safety regime be the most vigorously enforced and best conceived one possible. *National Realty & Construction Co.* v. *OSHRC,* 489 F.2d 1257, 1266 (D.C. Cir. 1973); *Brennan* v. *OSHRC,* 501 F.2d 1196 (7th Cir. 1974). The cases cited herein clearly support the conclusion that where an employer takes reasonable precautions by giving adequate warnings and safety instructions to his employees he will not be held responsible for hazards created by the employees' failure to follow instructions unless it is established that the instructions were a "mere sham" or that the employer regularly condoned their disregard. *Horne Plumbing & Heating Co.* v. *OSHRC, supra.*

As revealed in GE's main brief (Co. Br. 10-13), GE has an extensive eye protection program under which it supplies and demands the use of protective devices and has by its enforcement program reduced cases of non-users to a rarity. The ALJ concluded that the program was a "good one" and that the observed violation was "due in major part to employee lapse" (331a).[21] Under these cir-

[21] In view of these findings and the agreement among the compliance officers and Union Safety Director that GE's program on eye protection was a good one and that violations were a rarity, the Secretary's characterization of GE's policy as one of "benign neglect" (R. Br. 24) was unjustified and unjust. The superintendent in overall charge of Building 273 (although not in direct

cumstances, the failure of two employees (out of 3,500 employed in that building alone) to follow the clearly posted rule concerning eye protection was not foreseeable or preventable and the citation should have been dismissed.

4. The Secretary's contentions (R. Br. 29-34) respecting the repeated nature of the violation ignore the fact that in *GE* the Commission undertook to *define* a repeated violation (369a):

> "The term 'repeated' is therefore to read to mean happening more than once in a manner which flaunts the requirements of the Act."

Thus, the only test which may be employed in determining whether the alleged violation of .133(a)(1) was "repeated" is a "flaunting" test. Accordingly it is irrelevant here that the Commission later sought to distinguish or limit its *GE* ruling defining a repeated violation.[22]

II.

The Alleged K-11 Power Platform Violation

1. The Secretary admits (R. Br. 36) that there is no direct proof that the asserted violation occurred within the six-month limitations period, but contends the Commission had the right reasonably to infer it.

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charge of the two employees involved herein) testified that when he sees a safety violation he "stops whatever is happening at the time" (227a-229a, 233a). There was also a finding that GE enforces its safety glass rule up to and including the discharge of employees (296a, 152a, 101a-102a).

[22] See *Bethlehem Steel Corp.*, OSHRC No. 8392, CCH O.S.H.D. ¶19996 (1975) (appeal to the Third Circuit pending). One issue before the Third Circuit in this case is the propriety of the Commission's deviation from the "flaunting" test applied in *GE*.

The Act requires the Secretary to prove by a preponderance of the evidence that the violation occurred within the statute of limitations. The fact that the platform in question was used about once a month cannot *alone* satisfy this burden because until the platform was used *above* four feet from the ground under the standard cited by the Secretary, there would be no possibility of a violation. Accordingly, he must establish that it was used at a prescribed height within the prior six months to carry his burden of proof. This he has not done.[23]

2. The Secretary's contention (R. Br. 29-34) that the K-11 powered work platform is "facially" within the .23(c)(1) standard and that that standard is all-encompassing would, we submit, make surplusage all of the other guarding standards dealing with temporary platforms, scaffolds, mobile work platforms, etc., promulgated by the same Secretary under the same Act.[24] In no other case has the Commission applied the cited standard to a platform of the type and use here involved. Rather, the test is whether the platform is permanent both in construction and use. *U. S. Homes, Inc., Sandler-Bilt Division,* OSHRC No. 367, CCH O.S.H.D. ¶15227 (1972). The powered work platform here in question clearly was not and was so found by the Commission. Both the Fifth and Seventh Circuits have rejected the Secretary's attempts in other cases to have a similar standard (§1910.500(d)(1)) dealing with the

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[23] Unlike the standards involved in *Underhill,* there was no employee exposure to the hazard here involved unless and until the platform was used at a height which required guardrails. It was capable of being lawfully used at other heights without such guardrails (Co. Br. note 40).

[24] See, *e.g.,* §1910.28, §1926.500(d)(1) and §1910.29. See also Co. Br. 40-44.

guarding of platforms and open-sided floors broadly construed to include roofs, finding that such an interpretation was unreasonable and did not give employers proper notice of the proscribed conduct. *Diamond Roofing Co.* v. *OSHRC*, —— F.2d ——, CCH O.S.H.D. ¶20521 (5th Cir. 1976); *Langer Roofing and Sheet Metal, Inc.* v. *Secretary*, 524 F.2d 1337 (7th Cir. 1975).

In *Diamond Roofing* the court ruled:

> "An employer, however, is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalty against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents."

And in *Langer Roofing & Sheet Metal*, the court stated:

> "Unlike Humpty-Dumpty* the secretary may not give a word whatever meaning he chooses . . . ."

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* " 'When I use a word,' Humpty-Dumpty said '. . . it means just what I choose it to mean—neither more nor less.'

'The question is,' said Alice, 'whether you can make words mean so many different things.'

'The question is,' said Humpty-Dumpty, 'which is to be master—that's all.' " Lewis Carroll, *Through the Looking-Glass*, Chapter 6.

The courts' rulings in *Diamond* and *Langer* are particularly pertinent here. As more fully discussed in our main brief, both a platform within the meaning of .23(c)(1) and a scaffold within the ambit of .28 are defined as platforms. GE had a reasonable basis to believe that the K-11

powered work platform was not covered by .23(c)(1) and was in fact covered by a different standard.[25]

3. The novel and all-encompassing construction of .23(c)(1) urged here by the Secretary and Commission can only result in wholesale confusion among employers as to when that standard is applicable. This circumstance is not only patently unfair to employers but does not in any way contribute to the increased safety of their employees. The employer's position herein is "far better calculated than the Commission's" to insure compliance with the guarding standards and deference need not be afforded the Commission's interpretation since it is not of "long-standing." *Brennan* v. *OSHRC (Gerosa, Inc.),* 491 F.2d 1340, 1344 (2d Cir. 1974). Further, where the Secretary's proffered interpretation is "unreasonable" and has not been "consistently applied" the court need not defer to it. *Langer Roofing & Sheet Metal, Inc.* v. *Secretary, supra.*

4. The Secretary and GE are in basic agreement as to the definition of willfulness. It is a conscious, deliberate and voluntary act marked by indifference to the requirements of the statute. In *U. S.* v. *Dye Construction Co.,* 510 F.2d 78 (10th Cir. 1975), cited by the Secretary, the court defined willfulness as:

> "The failure to comply with a safety standard under the Occupational Safety & Health Act is willful if done knowingly and purposely by an employer who having a

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[25] The Secretary's argument to the contrary (R. Br. 41) predicated on the purchase of guardrails is absurd. Surely, he would not contend that GE could not take more stringent precautions than those required by his standards. Moreover, since the platform could be elevated to heights of more than 10 feet, railings might be required by virtue of .28.

free will or choice either intentionally disregards the standard or is plainly indifferent to its requirement." 510 F.2d at 81.

The Secretary has failed to establish that the lack of guardrails on the K-11 powered work platform (even were it a violation) met this test of willfulness.[26] He has not carried his burden of showing that GE was actually aware of the applicability of this standard to the K-11 platform or even that GE knew that the platform was being used without the railings required by its own rules.

In *Royster Co.*, OSHRC No. 13331, CCH O.S.H.D. ¶20312 (1975) (Commission Review Ordered), an employer was cited for failure to have guardrails on a platform 18 feet above the ground. The violation was found not to be willful, however, since it was not shown that the employer intentionally disregarded the standard. In the more recent case of *Graven Bros. & Co.*, OSHRC No. 2538, CCH O.S.H.D. ¶20544 (1976) (cited at Co. Br. 59), the Review Commission sustained the judge's dismissal of a willful violation even though the same supervisor who was in charge of the excavation involved in that case had been earlier informed of the applicable standards during a prior inspection in which he had received a citation for violation of one of the same standards. The Review Commission agreed with the judge that knowledge of a standard and a subsequent violation of that standard are insufficient to prove the violation was willful.

Accordingly, we submit that the citation for willfulness should be vacated.

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[26] See also *Daniel Construction Co.*, OSHRC No. 12525, CCH O.S.H.D. ¶20434 (1976); *D. Frederico Co.*, OSHRC No. 4395, CCH O.S.H.D. ¶20422 (1976); *Environmental Utilities, Inc.*, OSHRC No. 3141, CCH O.S.H.D. ¶20400 (1976).

CONCLUSION

For the foregoing reasons, the portions of the Commission's decision and order here under review should be set aside and the citations of violation therein upheld should be vacated.

Dated: New York, New York
May 6, 1976

Respectfully submitted,

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Joseph Boselli , being duly sworn, deposes and says, that on the 6th day of May 19 76 , at 11:30 o'clock A. M. he served the annexed Petitioner's Reply Brief No.75-4116 in RE: General Electric Co. v. Occupational Safety and Health Rev. Comm. etal

upon SEE SECOND SHEET

Esq(s)., Attorney(s)

for SEE SECOND SHEET

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that being the address designated in the last papers served herein by the said attorney.

Joseph Boselli

Sworn to before me this 6th day of May 1976

John Alusick

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